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Supreme Court of the United States

OCTOBER TERM, 1993

United States of America, *et al.*,

Petitioners,

v.

National Treasury Employees Union, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE SENIOR EXECUTIVES
ASSOCIATION IN SUPPORT OF RESPONDENTS

George J. Shaw, Jr.*
William L. Bransford
Christopher M. Okay
Shaw, Bransford & O'Rourke
Suite 800
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 463-8400

*Counsel for Amicus Curiae
The Senior Executives Association*

** Counsel of Record*

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INTEREST OF AMICUS CURIAE

The Senior Executives Association (SEA) is a private, nonprofit, voluntary, dues-supported organization representing career members of the federal Senior Executive Service (SES), and those in equivalent pay systems.¹ Its membership includes current and former members of the Senior Executive Service, as well as Senior Level and Senior Technical employees. SEA concerns itself with issues affecting the career executive service as a whole, and works to: improve the efficiency, effectiveness, and productivity of the federal government; advance the professionalism of career executives; advocate the interests of over 7000 career federal executives; and enhance public recognition of career federal executives.

Though the Senior Executives Association does not represent individual executives in federal personnel matters arising within the individual agencies, the Association is concerned about matters which might affect the integrity of the career executive corps. The Association has been recognized as the authentic voice of the federal career executive corps, and its views concerning the Senior Executive Service have often been solicited by congressional committees, the media, executive agencies, and officials of the executive branch. In its representational capacity, SEA participated in the notice and comment period for the Office of Government Ethics' (OGE) proposed Standards of Ethical Conduct for Employees of the Executive Branch, which were later promulgated as regulations implementing the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. § 501 *et seq.* (Supp. V 1993).

SEA represents only career, non-political appointees to the Senior Executive Service. The qualification authority for career appointees in the Senior Executive Service, like that for career executive branch employees at the GS-15 level and below, is the

¹ All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

Office of Personnel Management. 5 U.S.C. §§ 3132(a)(4), 3392(a) (1988 & Supp. V 1993). Though there are non-career, political appointees that occupy SES positions, the qualification authority for those positions lies with the appointing agency, rather than the Office of Personnel Management. 5 U.S.C. § 3132(a)(4) (1988). Career executive branch employees and senior executives, unlike noncareer appointees, have a property interest in their employment affording them the right to due process in personnel actions. *See* 5 U.S.C. §§ 7541(1), 7543 (1988). Thus career members of the SES, unlike non-career appointees, are subject to many of the same rights and limitations as members of the plaintiff class of career GS-15 level and below executive branch employees.

While career members of the Senior Executive Service were not represented among the Plaintiff class in Respondent's judicial efforts to overturn the honorarium ban provisions of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. § 501(b), the Senior Executives Association, on behalf of its membership and federal career executives, supports those efforts. The United States Court of Appeals for the District of Columbia Circuit overturned section 501(b) as applied to all executive branch employees. *NTEU v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993). It found that the honorarium ban placed an unconstitutional burden on certain First Amendment conduct of career federal employees without demonstrating a nexus between the speech and the performance of job duties. *Id.* at 1277. Career senior executives therefore will be adversely affected to the same extent as Respondents if the honorarium ban provisions are reinstated as to executive branch employees.

Thus SEA asserts essentially the same interest as both Respondents the National Treasury Employees Union (NTEU), and the certified Plaintiff class of career executive branch employees at the GS-15 level and below. Namely, SEA seeks to ensure that important First Amendment rights of career execu-

tive branch employees, including career executives, are not indiscriminately limited by congressional action, while seeking to promote the efficiency, effectiveness, and productivity of the federal government.

BACKGROUND

Title VI of the Ethics Reform Act of 1989, amending the Ethics in Government Act of 1978, prohibits receipt of compensation for speeches, appearances or articles by any Member, officer, or employee of the federal government. 5 U.S.C. app. §§ 501(b), 505(3) (Supp. V 1993). This ban on "honorarium" was enacted as a Congressional response to a number of highly publicized ethics scandals involving its own members. *E.g.*, 135 Cong. Rec. H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Martin). While the ban does not create an express ban on speech by United States government employees, it tends to limit the exercise of free speech by the targeted legislative, judicial, and career executive branch employees.

Respondent NTEU, and one of its local chapters, joined with the American Federation of Government Employees, a number of individual plaintiffs, and a certified class representing persons employed by the Executive Branch at the GS-15 grade level and below. This class filed suit in the United States District Court for the District of Columbia to enjoin enforcement of the "honorarium ban." The district court found the honorarium ban unconstitutional as applied to all executive branch employees, and severed the provision as it applied to these employees. *NTEU v. United States*, 788 F. Supp. 4, 11 (D.D.C. 1992), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993). The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision severing "officer or employee" from section 501(b) except in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees. *NTEU v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993). The decision below ensured protection

of certain First Amendment conduct of not only Respondent and members of the Plaintiff class, but of all executive branch employees, including career members of the Senior Executive Service.

SUMMARY OF ARGUMENT

The court of appeals properly found the honorarium ban unconstitutional for its overbreadth as applied to all executive branch employees. The court of appeals found, by applying the *Pickering* balancing test, that the governmental interest in efficiency and preventing the appearance of impropriety did not outweigh the interest of career executive branch employees in exercising free speech rights where a substantial portion of the speech activities have no nexus to functions performed by the employing agency.

Career executive branch employees at every grade and pay level are already subject to a comprehensive scheme of regulatory and executive guidelines setting forth stringent limits on off-duty conduct. Given these less-restrictive alternatives already in place in the executive branch personnel system, Congress should have drawn the honorarium ban more narrowly to advance its interests. Congress never expressed specific concerns about the appearance of impropriety, or a reduction in governmental efficiency, stemming from the receipt of honorarium by career executive branch employees or Senior Executives for engaging in speech activities lacking any nexus to the performance of governmental functions. In addition, Congress' motives for discriminating among different forms of employee speech are suspect, and demand greater justification. Because the honorarium ban does not promote a legitimate, substantial interest of the government as applied to a substantial portion of the off-duty free speech conduct of career federal employees, it cannot be upheld under the *Pickering* First Amendment analysis.

The court of appeals properly severed the unconstitutional honorarium ban provision as applied to career executive branch employees, including career federal executives, from the remainder of the Ethics Reform Act of 1989. That court found that the remaining provisions will adequately fulfill the purposes of Congress in enacting the ban. In addition, the court below properly struck the offending provision because there is no viable alternative construction of the ban which would serve the interests of Congress.

ARGUMENT

I. THE HONORARIUM BAN PROVISIONS AS APPLIED TO CAREER EXECUTIVE BRANCH EMPLOYEES PLACE AN UNCONSTITUTIONAL BURDEN ON THE EXERCISE OF FIRST AMENDMENT RIGHTS BY THESE EMPLOYEES.

A. The Court of Appeals Decision Properly Applied the *Pickering* Standard of Review.

The United States Court of Appeals for the District of Columbia Circuit found that the balancing test formulated in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), supplies the standard of review for the congressional action in question. It chose the *Pickering* balancing analysis because the legislative provision at issue here involves a governmental restriction on the exercise of free speech by its employees.² In its Brief,

² Petitioner relies on the Court's *Pickering* analyses in *Connick v. Myers*, 461 U.S. 138 (1983), and *Waters v. Churchill*, 114 S. Ct. 1878 (1994), in suggesting that the government is owed great deference where it seeks to regulate the speech of its employees. (Brief at 13-14). However, as set forth more fully in Section I.B. below, the employee speech at issue in *Connick* and *Waters* was speech by employees concerning work-related matters, or having an adverse effect on the workplace. Therefore, the off-duty employee speech targeted by the honorarium ban, which could have no nexus to governmental functions, is fundamentally different from the speech at issue in those cases. Thus, SEA contends that *Connick* and *Waters* are not analogous to this case, and the results in those cases are not applicable here.

Petitioner argues that Congress has the authority to compel career employees to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest, and to be justly compensated for their expressive efforts. (Brief at 13-14). It justifies this position by contending that the honorarium ban promotes administrative efficiency and avoids the appearance of impropriety by government employees. (Brief at 14, 17-18). However, this Court has long held that the government may not so severely burden its employees without substantial justification. *Pickering*, 391 U.S. at 568 (citing, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

To this end, this Court has developed a balancing test to weigh the respective interests of the government employee in exercising free speech rights against the government's interest in maintaining an effective workforce. In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court recognized a state's "legitimate and substantial interest" in investigating the competence and fitness of its teachers. *Id.* at 485. The Court acknowledged that a teacher's off-duty conduct was a permissible basis for determining his fitness, and that a state has a vital concern in making this inquiry, based upon its countervailing interest in the efficient administration of public education. *Id.* Yet the Court's decision in *Shelton* ultimately turned on the Arkansas legislature's unlimited inquiry into the associational background of its employees. *Id.* at 490. In overturning the Arkansas statute, the Court expressed concern that the inquiry could be conducted without regard to the bearing of a particular associational relationship upon the teacher's occupational competence or fitness. *Id.* at 488. Ultimately, the Court found the weight of Arkansas' articulated interest insufficient to uphold the law where the interest could be more narrowly achieved. *Id.* at 490.

Honing this interest-balancing inquiry, the Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), held that the government may not unreasonably restrict its employees' exercise of First Amendment freedoms. *Id.* at 568. In that case, the Court struck a balance between the interests of the public employee as a citizen in commenting upon matters of public concern, and the interest of the government as employer in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 574.

The *Pickering* interest-balancing test has since been firmly established as the appropriate inquiry in cases concerning the government's assertion of an interest in limiting First Amendment activities of its own employees. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983). The Court has consistently required the government to articulate a substantial and important governmental interest supporting a broad First Amendment intrusion. E.g., *U.S. v. O'Brien*, 391 U.S. 367, 382 (1968) (requiring substantial state interest in continued availability of draft cards to outweigh incidental limitation on free speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465 (1958) (state interest in regulating intrastate business insufficient to justify intrusion on associational rights); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (municipal interest in taxing occupational licenses insufficient to outweigh citizen interest in free association).

In this case, the honorarium ban is a prophylactic law, intended to counter public perceptions that members of Congress engage in influence-peddling or create the appearance of impropriety when they make appearances, give speeches, or write articles, and are compensated for these activities. E.g., 135 Cong. Rec. H8747-48 (daily ed. November 16, 1989) (statement of Rep. Martin). The ban's prohibition on compensation for expressive activity is all-encompassing, without regard for the intent, content, or effect of the activity. The ban does not

attempt to distinguish between speech activities that disrupt or interfere with the efficient operation of the government and those activities which do not have that effect. 5 U.S.C. app. § 505(3) (Supp. V 1993). Nor does the honorarium ban make a distinction between the targeted speech and the performance of job-related duties by the employee. *Id.* Based on the broad First Amendment impact of the ban's provisions, the government must assert a substantial and important interest to justify this legislative prohibition.

It is well-established that a government acting as employer has an interest in regulating the speech of its employees that differs significantly from its interests in regulating the speech of the general public. *Pickering*, 391 U.S. at 568. However, while *Pickering* and its progeny recognize this principle, they accommodate the government's interest by weighing it against the employee's constitutional right to engage in First Amendment activities. In those cases, the Court balanced the interests in favor of protecting the employee's First Amendment rights when the exercise of those rights was unrelated to the performance of governmental functions. *Rankin*, 483 U.S. at 388-89; *Pickering*, 391 U.S. at 574; *Shelton*, 364 U.S. at 490.

Because the honorarium ban has a broad indiscriminate impact upon the exercise of free speech by its employees not necessarily relating to the efficiency of government, the court of appeals properly applied the *Pickering* balance, requiring the government to assert an important and substantial legitimate interest to justify the honorarium ban.

B. The Balance of Interests in *Connick*, *Waters*, and Similar Decisions are Not Analogous to This Case Because the Honorarium Ban Affects Employee Speech That is Unrelated to, and Has No Impact upon, Governmental Functions.

Petitioner, relying principally upon the Court's application of the *Pickering* balancing in *Waters v. Churchill*, 114 S. Ct.

1878 (1994), and *Connick v. Myers*, 461 U.S. 138 (1983), suggests that the balance of interests in this case should reflect a recognition of the government's broad powers to restrict the speech of its employees. (Brief at 13-14). SEA contends, however, that the Court's balance of the parties' relative interests in those cases is not analogous to this dispute.

Neither *Waters v. Churchill*, nor *Connick v. Myers*, concerned employee speech unrelated to the employer's business, as does the legislation at issue here. For instance, the Court's decision in *Connick* turned on the fact that the employee speech at issue arose from and concerned an employment dispute between the employee and her employer. 461 U.S. at 153. Likewise, *Waters* concerned the discharge of a government employee because of alleged statements to a co-worker that were "reasonably believed" by her governmental employer to be "disruptive" to the workplace. 114 S. Ct. at 1882-83. On those facts, *Waters* merely enunciated the common-sense principle that a government employer has the discretion to discipline or even terminate an employee for speech the employer "reasonably believes" has an impact on, or relates to employment. *Id.* at 1886, 1889-90. However, unlike *Waters* and *Connick*, the honorarium ban impinges on all off-duty speech by a government employee, regardless whether the speech affects the performance of a governmental function. Congress, in enacting the ban, never articulated a "reasonable belief" that the targeted off-duty employee speech was disruptive or impinged upon governmental efficiency.

Petitioner asserts, in arguing that Respondents' interests in engaging in free speech activities should receive less weight under the *Pickering* balance, that it is irrelevant to this case whether speech under the honorarium ban touches upon matters of public concern. (Brief at 15-16 n.17). It is precisely because the honorarium ban's prohibition on compensation for expressive activity is not narrowly focused (but rather is (a) unlimited,

and (b) applies without regard to any relationship of the expressive activity to the employee's job) that the government must articulate a legitimate, substantial and important interest in support of its action. *See Shelton*, 364 U.S. at 490. The ban has a chilling effect on the exercise of vital First Amendment freedoms by all career federal government employees, and this effect must be weighed into this Court's *Pickering* balance.

Petitioner asserts in its Brief that Congress may regulate even important constitutional rights of government employees where the exercise is deemed by Congress to interfere with governmental efficiency. (Brief at 14) (citing *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947)). The government apparently attempts to justify the honorarium ban's discriminatory treatment of employee speech by claiming that the speech adversely affects administrative efficiency and public confidence in the government. (Brief at 18-19). This argument must also fail.

The Court in *United Pub. Workers*, a pre-*Pickering* case, examined the First Amendment impact of the Hatch Act. 330 U.S. at 96. In particular, by employing a *Pickering*-type analysis, the Court weighed the interests of federal workers in taking an active part in partisan political activities, which was already prohibited under Civil Service Rules, against the government's interest in maintaining the competence and integrity of the federal service. *Id.* The Court upheld the Hatch Act, finding that Congress reasonably determined that such political activity menaced the integrity and competency of the service. 330 U.S. at 103. However, the off-duty First Amendment conduct by career executive branch employees targeted by the honorarium ban was never deemed by Congress to interfere with governmental efficiency, as was the political activity that prompted enactment of the Hatch Act. *Compare* 135 Cong. Rec. H9256 (daily ed. November 21, 1989) (extension of remarks of Rep. Fazio), with *United States Civil Serv. Comm'n v. National Ass'n*

of Letter Carriers, 413 U.S. 548, 555-556 (1973); and S. Rep. No. 103-57, 103d Cong., 1st Sess. 2-12 (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1802-13. Thus, the Court's balance of interests in *United Pub. Workers* is also not analogous here.

Finally, Petitioner argues that the honorarium ban is valid due to its "mild" First Amendment impact compared, for example, to the impact of more restrictive, but valid, regulations such as the Hatch Act upon federal employee political freedoms. (Brief at 27). However, Petitioner's analogy to the Hatch Act does not carry weight under the *Pickering* balance. The record developed in the district court below demonstrates that speech affected by the honorarium ban's prohibition on the receipt of compensation is not limited solely to matters of personal concern or workplace grievances. *NTEU v. United States*, 788 F. Supp. 4, 6 & n.1. (D.D.C. 1992). Further, the impact of the honorarium ban is not limited solely to situations where an employee is speaking as an employee. *Id.* While the Hatch Act expressed Congress' specific concern about the impact of employee participation in partisan political activities on the federal workforce, the effect of the honorarium ban's prohibition on employees speaking as members of the public is not so narrowly confined.

Therefore, SEA contends that the honorarium ban does not simply implement the government employer's "shopkeeper" right to regulate disruptive or improper personal activity in the federal workplace, as was the case in *Connick*. 461 U.S. at 151-52. Rather, the ban indiscriminately sanctions federal employees for off-duty expressive activities involving any subject matter, including subjects wholly unrelated to the performance of job duties or agency business. Therefore, the Court's conclusions in weighing the parties' respective interests in *Connick* or *Waters* are inapposite to this case. Based on the foregoing, this Court should simply apply the *Pickering* balance to the facts of

this case, requiring a substantial and legitimate governmental interest to support the honorarium ban.

C. The Honorarium Ban is Unconstitutional Because the Interests of Career Employees in Exercising Free Speech Outweigh the Interest of the Government in Promoting Governmental Efficiency and Integrity.

As set forth more fully below, the honorarium ban's financial disincentives on speech inflict a substantial burden on the exercise of vital First Amendment rights by career executive branch employees. These employees, for purposes of engaging in speech activities affected by the ban, are situated as ordinary citizens speaking on topics that have no bearing on the federal service. In addition, career employees are already subject to substantial regulatory limitations upon their off-duty activities. Therefore, Congress' interest in promoting efficiency and integrity in the federal government does not adequately support the broad First Amendment impact of the honorarium ban.

1. The Honorarium Ban Places a Substantial Burden on Vital First Amendment Rights of Government Employees.

Petitioner asserts that the honorarium ban does not prohibit any speech by government employees, but rather, it merely limits receipt of compensation for speech by career executive branch employees. (Brief at 15). A statute, however, is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Arkansas Writer's Project, Inc. v. England, Comm'r of Revenue of Arkansas*, 481 U.S. 221, 231 (1987). To withstand constitutional scrutiny, such legislation must be necessary to promote a compelling interest of the government, and the statute must be shown to be narrowly drawn to achieve that end. *Simon & Schuster*, 112 S. Ct. at 509.

Even an ostensibly "incidental" financial limitation upon a member of the general public speaking on matters of public concern heightens a law's First Amendment impact. *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988).

This Court has required the government to shoulder a heavy burden in justifying a regulation creating financial burdens on speech. For example, the Court in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), overturned a state use tax on paper and ink that impacted most heavily on the print media. The Court held that where the government has at its disposal alternative means of achieving the same interest without raising concerns under the First Amendment, legislation creating a discriminatory financial impact upon First Amendment rights will not survive scrutiny. *Id.* at 586, 592-93. In this case, the financial burden imposed upon government employees engaging in First Amendment activities is likewise substantial, and has the effect of prohibiting outright certain speech. *See* 5 U.S.C. app. § 505(3) (Supp. V 1993). Certainly the financial burden created by the ban has a substantial chilling effect on employee First Amendment rights, and will discourage some speech because of the prohibition on compensation. *Meyer*, 486 U.S. at 424-25. Although the honorarium ban does not single out appearances, speeches or articles regarding only certain topics, the ban does single out any "appearances, speeches, and articles" by federal executive branch employees. 5 U.S.C. app. § 505(3) (Supp. V 1993). The ban's burden, therefore, extends to the exercise of First Amendment rights by government employees regardless of content or context. *Id.*

While Petitioner agrees that the financial burden on career federal employees under the ban triggers First Amendment concerns, Petitioner suggests that the content-neutral nature of the ban somehow lessens the impact on targeted employees. (Brief at 15-16 n.17). However, the court of appeals found that

the conduct at issue was not limited to matters of only personal or private concern. *NTEU v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). SEA contends that, because the ban's financial burden extends to employees speaking as private citizens on matters of public concern, the Respondents' interests in exercising First Amendment rights are enhanced. In fact, the ban has a chilling effect on all speeches, articles or appearances by government employees, including those involving matters of public concern. *See 5 U.S.C. app. § 505(3)*. A distinction between speech on matters of public concern as opposed to other comments by public employees cannot be determined in the abstract, when the speech has not even occurred. What is certain is that the ban prohibits compensation for speech that relates to matters of public concern. It is thus overly broad and likewise impacts on the exercise of constitutional rights by career government employees.

The honorarium ban in this case is not a tax, such as the discriminatory regulation in *Minneapolis Star*, 460 U.S. at 592-93, in that its financial limitations are not aimed at the government's critical interest in the collection of revenue. Yet the ban's effect is similar to that of an absolute tax on the receipt of compensation for the exercise of free speech by government employees in that its sanctions have notable censorial effects.³ This Court has found that even the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions, and on that basis has invalidated governmental regulations. *Id.* at 588 (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Clearly, the honorarium ban's imposition of sanctions, and the resulting censorial effect of those sanctions, for engaging in

³ Under the ban, the United States Attorney General is authorized to bring a civil action against any employee violating its provisions, and courts may assess a civil penalty in the amount of \$10,000 or the amount of the honoraria, whichever is greater, against the employee. 5 U.S.C. app. § 504(a) (Supp. V 1993).

certain free speech activities regardless of any nexus of the speech to federal employment substantially infringe on the First Amendment rights of career federal employees. Thus, Petitioner must carry a heavy burden in justifying this legislation. SEA contends that Petitioner has failed to do so here.

2. Application of the Honorarium Ban to Career Executive Branch Employees was Unjustified, Given the Existence of Less Speech-Restrictive Alternatives.

SEA does not contend that the government is required to use the "least restrictive means" to promote its interest in promoting the efficiency of the federal service. But the Court has never condoned overbroad speech-limiting legislation drafted as a blanket solution to a specific administrative problem. *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960). The Court has considered the existence of less-restrictive alternatives in determining whether government regulation of speech is overbroad, and not "finely tailored" to promote the government's ends. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-88 (1983); *Shelton*, 364 U.S. at 488.

SEA submits that there are well-established measures already in place to combat the corruption targeted by the honorarium ban that are less speech-restrictive than a prophylactic ban on the compensated free speech of career employees. For example, federal law prohibits all executive branch employees from receiving compensation for the performance of job duties from any outside source. 18 U.S.C. § 209 (1988 & Supp. V 1993). Also, in 1989 President Bush issued Executive Order 12,674, which established principles of ethical conduct applicable to all employees in the executive Branch. Exec. Order No. 12,674, 54 Fed. R. 15,159 (1989), 5 U.S.C. § 7301 note (Supp. V 1993). The Order's intent was to ensure that every citizen

would have complete confidence in the integrity of the federal government. *Id.* The provisions of the Order perform some of the same functions encompassed by the honorarium ban by including express prohibitions on the following: holding financial interests that conflict with the conscientious performance of duty; the improper use of non-public government information to further any private interest; the solicitation or acceptance of any gift or other item of monetary value from any person or entity with an interest in activities regulated by the employee's agency; and the use of public office for private gain. *Id.*

The Executive Order was later used as a platform by the OGE when it promulgated regulations interpreting the Ethics Reform Act of 1989.⁴ 5 C.F.R. Parts 2635 & 2636 (1994); 57 Fed. R. 35,006, 35,036 (1992); *see also* 5 U.S.C. app. § 503(2) (Supp. V 1993). The OGE regulations contain a comprehensive scheme of ethical conduct guidelines universally applicable to career federal employees, inclusive of a ban on acceptance of honorarium by career federal employees.⁵ However, OGE in

⁴ Prior to the Ethics Reform Act of 1989, Title IV of the Ethics in Government Act of 1978 authorized the Office of Personnel Management, rather than OGE, to promulgate regulations aimed at preventing conflict of interest situations by federal employees. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1862-64 (amended 1989). Title IV was enacted in response to perceived shortcomings in the previous system, under which the Civil Service Commission and the executive agencies promulgated rules and regulations to implement financial disclosure and conflict of interest principles set forth in Executive Order 11,222. Senate Governmental Affairs Committee, Ethics in Government Act of 1978, S. Rep. No. 95-170, 95th Cong., 2d Sess. 28-31 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4244-47.

⁵ Congress itself has historically been exempt from the guidelines listed in this section, except for the honorarium ban provisions. It is unclear from the limited legislative history of section 501(b) how Congress suddenly developed a grave concern over the receipt of honorarium by career federal employees and career executives for off-duty conduct unrelated to the performance of their duties.

terpreted the prohibition on honorarium in the Ethics Reform Act as requiring a nexus between appearances, speeches or articles by a government employee, and the performance of their job duties.⁶ *See* 5 C.F.R. § 2636.202 (1994). The regulations also contain provisions expressly derived from the principles of ethical conduct set forth in section 101 of Executive Order 12,674, which prohibit receipt of compensation for teaching, speaking, or writing related to the employee's official duties. 5 C.F.R. § 2635.807(a) (1994).

The aforementioned OGE guidelines also authorize individual executive branch and independent agencies to issue supplemental regulations concerning the ethical conduct of its employees in concurrence with the OGE. 5 C.F.R. § 2635.105 (1994). A growing number of government agencies have issued proposed and final regulations concerning outside employment and other subjects, which implement restrictions on employee conduct in addition to the OGE regulations set forth in 5 C.F.R. Part 2635. For example, the Department of the Treasury has proposed regulations requiring its employees to obtain prior approval before engaging in any outside employment or business activities with or without compensation. 58 Fed. Reg. 41,199 (1993) (to be codified at 5 C.F.R. § 3101.104). Similar limitations have been implemented by the Department of Defense, 5 C.F.R. § 3601.107 (1994), the ICC, 5 C.F.R. § 5001.104 (1994), the CFTC, 5 C.F.R. § 5101.103 (1994), and the FTC, 5 C.F.R. § 5701.101 (1994).

Based upon the foregoing, career federal employees have long been subject to a comprehensive scheme of ethical regulations concerning on- and off-duty conduct. There exist adequate

⁶ A statute should not be construed in a way that would invalidate a series of regulations promulgated by the agency charged with administering that statute. *Athens Community Hosp., Inc. v. Schweiker*, 743 F.2d 1, 8 (D.C. Cir. 1984). Upholding the ban's application to career executive branch employees in this case would certainly invalidate the OGE's regulatory scheme concerning acceptance of honorarium.

limitations on executive branch employee conduct both in, and outside, the federal workplace to promote the stated interests of the government. The existence of an adequate system of safeguards which do not overburden the free speech of career employees demonstrates that Congress could have more narrowly defined its legislation to accomplish the legislative purpose of the honorarium ban without unnecessarily impeding the First Amendment rights of career federal employees and executives.

3. The Government's Real Interest in Enacting the Honorarium Ban is Not Promoted by the Ban's Application to Career Federal Employees.

Even where the government demonstrates a compelling interest in support of a regulation impacting on the First Amendment, the regulation will not survive constitutional scrutiny unless it is narrowly drawn or finely tailored to advance that specific interest. For example, in *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court reviewed a state statute which forcibly appropriated income received by an accused or convicted criminal from writings or other works describing his crime. *Id.* at 504-05. The government's stated interest in that case was in preventing criminals from recounting the story of their crimes for profit before the victims of the crime were compensated. The Court found, however, that the government's real underlying interest was in compensating the victims of violent crimes. *Simon & Schuster*, 112 S. Ct. at 510-11. Thus, the Court held that the law was not narrowly tailored to advance the state's real interest in compensating crime victims. *Id.* at 512.

Like the Crime Victims Board in *Simon & Schuster*, which unsuccessfully argued in support of New York's "Son of Sam" legislation, Petitioner here has asserted no substantial interest in burdening First Amendment rights of career executive branch

employees where the limitation does not promote the efficiency and integrity of the government. Rather, SEA contends that the Government's real interest in this case lies in preventing impropriety or the mere appearance of impropriety by government employees for activities which bear some nexus to agency functions. In fact, the government has no real underlying interest in limiting compensation to the career civil employee or executive who engages in off-duty expressive conduct unrelated to his federal employment. Thus the government's interest in upholding this law as to these employees is less weighty than its interest in applying this law to non-career appointees and Members of Congress. 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss).

The honorarium ban provisions of the Ethics Reform Act were intended primarily to allay perceptions by the public that Members of Congress were selling influence or appearing to sell influence by receiving compensation for speeches, public appearances, endorsements and the like. 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (statement of Rep. Martin); 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss); 135 Cong. Rec. S15,971-72 (daily ed. November 17, 1989) (statement of Sen. Mitchell); *see also* To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform 35 (Mar. 9, 1989) (Wilkey Commission Report) (J.A. 252-53). Rather than being a reasoned approach to restoring public confidence in governmental institutions, the extension of the honorarium ban to encompass career federal employees was an interrelated trade-off for the roughly twenty-five percent raise in its own salaries implemented by virtue of the pay raise legislation. *See* 135 Cong. Rec. H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Martin); 135 Cong. Rec. S15,971-72, S15,987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell).

At the same time, Congress apparently decided to extend these provisions not only to Members, but also to all federal executive branch and judicial branch employees. *See generally* Wilkey Commission Report at 35-36 (J.A. 253-54). However, in so doing, Congress did not express concerns about the receipt of outside income or honorarium by any career federal employee, or even career members of the Senior Executives Service, where there was no connection between the payments or payor, and the employee's federal functions. *Id.* Notably, while Congress did not ultimately include pay raise provisions for career executive branch employees in the final Legislative Branch Appropriations Act of 1992, the honorarium ban remained in place as applied to all career federal employees, including the Senior Executive corps. Pub. L. No. 102-90, 105 Stat. 447, 450 (codified as amended at 2 U.S.C. § 5318 note); *also* Wilkey Commission Report at 37-38 (J.A. 255-57); 5 U.S.C. app. §§ 501(b), 505(2) (Supp. V 1993). Though Petitioner, relying on the Wilkey Commission Report, (Brief at 19-20), suggests that its interest in extending the ban to career employees was enunciated in that Report, the Wilkey Commission did not identify a single specific evil stemming from the receipt of honoraria by career employees for speech unrelated to their employment. Wilkey Commission Report at 35-36 (J.A. 252-54).

Like the New York Crime Victims Board in *Simon & Schuster*, Petitioner appears to assert that the purported effect of the honorarium ban, namely, achieving administrative efficiency in the government by prohibiting honorarium for all employee speech, is in fact the government's primary interest. (Brief at 16-17). The government reasons that the honorarium ban's prohibition as applied in this context promotes the integrity of the federal workforce, furthers administrative efficiency, and serves as a prophylactic measure that resists attempts at evasion. *Id.* In making this contention, however, Petitioner essentially concedes that the ban affects more speech than was

justified to promote the purposes of Congress. (Brief at 16-17, 35).

Therefore, the real interest of the government in promoting governmental efficiency and integrity does not justify the enactment of the honorarium ban as applied to career federal employees.

4. The Honorarium Ban is Unconstitutionally Overbroad in that it Regulates More Speech Than is Necessary to Serve the Government's Underlying Interest.

SEA does not dispute that the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honorarium. *See NTEU v. United States*, 990 F.2d 1271, 1274 (D.C. Cir. 1993). However, the government must demonstrate that its financial regulation of career federal employee speech promotes a substantial government interest that would be achieved less effectively absent the regulation. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). As noted by the court of appeals, the principles and analysis enunciated in *Ward* are applicable to the honorarium ban's content-neutral economic regulation of speech by its employees. *NTEU*, 990 F.2d at 1274; *see also Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 U.S. 501, 511 n.** (1991). The government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. Rather, each activity within the regulation's proscription must be an appropriately targeted evil. *Ward*, 491 U.S. at 799-800 (citing *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

The court of appeals, applying these principles, correctly found that an articulated nexus between the employee's job and his employment was required to create the sort of impropriety or appearance of impropriety at which the statute is ostensibly

aimed. *NTEU*, 990 F.2d at 1275. In so holding, the court echoed a long line of this Court's cases dealing with similar issues. *E.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563, 569-70 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Court found in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), that a mere hypothetical possibility of a corrupt exchange of political favors is not sufficient to carry the government's heavy burden. *Id.* at 498. Rather, there the Court required a real connection between the conduct and the danger to the efficiency of the service. *Id.* at 500-01. The honorarium ban at issue here is overbroad.

The honorarium ban burdens equally employee speech having no conceivable relationship to one's performance of job duties, and employee speech that may have a bearing on one's government employment.⁷ Receipt of honorarium by non-career and career federal employees and executives for certain First Amendment activities, where those activities have a nexus to the performance of agency functions, is arguably an evil appropriately targeted by the honorarium ban. *NTEU*, 990 F.2d at 1275-76. However, the ban's prohibition on the receipt of honorarium by career federal employees for expressive activity that has no relationship to federal employment is not justifiable on the same grounds.

Petitioner suggests that its broad-ranging economic regulation of speech unrelated to governmental business may reflect an excessive, yet somehow acceptable, degree of caution. (Brief at 35). SEA disagrees. None of the ban's legislative history suggests that Congress even addressed the issue of whether

⁷ A number of specific examples of employee speech activities were identified in the lower court proceedings in this action as being affected by the ban. *NTEU*, 990 F.2d at 1275. In addition to these examples, it is generally known within the Washington, D.C. federal government community, or is capable of accurate and ready determination, that members of the Senior Executive Service also engage in off-duty speech activities unrelated to their employment that will have consequences under the ban. *See Fed. R. Evid.* 201(b).

employee speech unrelated to government employment posed a threat to governmental efficiency or integrity. *See, e.g.*, 135 Cong. Rec. H9253-57 (daily ed. November 21, 1989) (extension of remarks of Rep. Fazio). Thus it is disingenuous for Petitioner to now intimate that Congress employed any degree of caution in implementing this regulation against career executive branch employees. In fact, evidence introduced at trial by the Respondents revealed numerous specific examples of employees who would be unreasonably burdened by the law. *NTEU*, 788 F. Supp. at 6 & n.1. The purported interest of the government in applying the ban to career employees for speech unrelated to employment, namely, forestalling in the executive branch the same types of ethics scandals and public disapproval that plagued the legislature, is speculative at best, and cannot support the overbreadth of the ban in the *Pickering* balance.

Because of the indiscriminate nature of the ban, Petitioner cannot accurately contend that a substantial portion of the honorarium ban's burden on speech serves to advance congressional goals. The government has not identified any public perception of corruption in the receipt of honorarium by career federal employees for expressive activity lacking a nexus to federal agency functions. In fact, the government concedes that it would prefer to overburden employee speech rather than to allow even a few "questionable" payments to occur.⁸ (Brief at 35). The ban so applied is not a regulation narrowly drawn, or finely tailored, to serve the government's interest in avoiding the appearance of impropriety or in promoting efficiency.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—extends to the exercise of free speech by public employees whose speech is unrelated to the fact of their employment. *Pickering v. Board of Educ.*,

⁸ As explained in Section C.2., *supra*, such "questionable" payments are probably already prohibited by, or certainly could be proscribed by, existing regulatory machinery.

391 U.S. 563, 573-74 (1968). Respondents, and the members of the Senior Executive Association, therefore, have an overriding interest in engaging in off-duty speech that has no nexus to the efficiency of the federal service. Likewise, these career executive branch employees have the right to be free from inhibitory effects of congressional legislation on the exercise of this right in the absence of a substantial and important governmental interest justifying the legislation. *Id.* at 574. Without having identified a specific danger to the efficiency of the government flowing from career employees exercising these rights, Congress nevertheless imposed a broad and indiscriminate financial burden and disincentive on employee speech.

Based on the foregoing, under the *Pickering* balancing test the interest of career executive branch employees, including career senior executives, in exercising the right to speak on issues of public importance outweighs the interest of the government in promoting the efficiency and integrity of the federal service. Because the honorarium ban is not a regulation narrowly drawn or finely tailored to serve the government's interest in avoiding the appearance of impropriety or in promoting efficiency, the interest of employees in exercising the constitutional right to free speech outweighs the government's interest in upholding the overbroad honorarium ban. Therefore, the honorarium ban must be struck down.

5. The Honorarium Ban is Unconstitutionally Underinclusive Because It Prohibits the Receipt of Compensation Only for Certain Forms of Expressive Conduct.

The D.C. Circuit did not reach the issue whether the honorarium ban is unconstitutionally underinclusive because it found that the ban was overbroad. *NTEU v. United States*, 990 F.2d 1271, 1277 n.5 (D.C. Cir. 1993). But in order to withstand constitutional scrutiny, the government bears a heavy burden in

justifying a statute that discriminates among different forms of speech. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988). Where governmental action singles out certain First Amendment conduct for adverse treatment, the courts have inferred an intent to single out the content of the message, and have therefore required a closer fit between the law and its apparent purpose than for other legislation. *News Am. Publishing*, 844 F.2d at 805. It simply is no defense to a discriminatory statute to argue, as Petitioner argues here, that other avenues of expression remain available to the affected class of persons in spite of the law's prohibition. (Brief at 16). Rather, more rigorous constitutional scrutiny of such legislation is required. *News Am. Publishing*, 844 F.2d at 805.

SEA contends that the honorarium ban also must fall because of its underinclusiveness. The ban prohibits the receipt of compensation by career executive branch employees for appearances, speeches and articles. 5 U.S.C. app. § 505(3) (Supp. V 1993). However, the ban does not specifically prohibit receipt of compensation by a career executive branch employee for off-duty teaching, fiction writing, theatrical or musical performances, poetry, art, or a broad range of other expressive conduct. *Id.* Thus the ban has a chilling effect upon expressive activity to the extent that this activity is an appearance, speech or article. Because the honorarium ban discriminates against certain forms of speech, while not regulating other forms of expression, a close fit is required between the ban and its apparent purpose. *News Am. Publishing*, 844 F.2d at 805.

The honorarium ban would not necessarily be saved even if Congress chose to prohibit employee receipt of compensation for engaging in specific speech activity where these particular activities were demonstrated as drawing intense and disapprov-

ing public scrutiny to suspect honorarium payments. As stated by the district court below, the statute's focus on speech "belies the notion that the governmental interest in suppressing questionable payments is paramount to all others . . ." *NTEU v. United States*, 788 F. Supp. 4, 11 (D.D.C. 1992). Congress has clearly placed a great burden upon executive branch employees by regulating their participation in arguably the most available, most effective, and the most public means of expression.

Petitioner asserts that there are still numerous expressive activities that are not foreclosed to executive branch employees by virtue of the honorarium ban. However, Congress' selectivity raises at least the inference that it was concerned about the content of employee speech. Without exploring the actual motives of Congress in limiting only three modes of speech under the ban, SEA contends that the underinclusive nature of the honorarium ban triggers a more rigorous constitutional scrutiny of this legislation. *News Am. Publishing*, 844 F.2d at 805.

II. BECAUSE THE HONORARIUM BAN VIOLATES THE FIRST AMENDMENT AS APPLIED TO CAREER FEDERAL EMPLOYEES, IT WAS PROPERLY SEVERED BY THE COURT OF APPEALS.

Congressional legislation that is objectionable on constitutional grounds must be invalidated. However, unless it is evident that the legislature would not have independently enacted the invalid provisions, the invalid part may be dropped if what is left is fully operative as law. *Alaska Airlines, Inc. v. Brock, Secretary of Labor*, 480 U.S. 678, 684 (1987); *see also NTEU v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993)(citing *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976)). If the balance of the legislation is incapable of functioning independently, Congress could not have envisioned such a severance. *Alaska Airlines*, 480 U.S. at 684. In this regard, courts should refrain

from invalidating more of the statute than is necessary. If the remaining statute will function in a manner consistent with the intent of Congress, then the objectionable portions of it may be severed from the whole. *Id.*

In this case, the honorarium ban is constitutionally deficient due to Congress' indiscriminate infringement on the First Amendment rights of career federal employees and executives. The ban infringes on the free speech of career federal employees where the off-duty activity has no nexus to the nature of the employee's performance of duty. In the absence of a ban on receipt of honorarium by career employees, the ban's provisions could remain fully operative as law as applied to Members of Congress and their staffs, non-career federal employees, and judicial branch employees. The remaining provisions fully address the evils Congress identified concerning acceptance of honorarium by these classes of public employees. Yet, except for the severance accomplished by the court of appeals, the ban does not readily admit of alternative construction that addresses Respondents' concerns. *NTEU*, 990 F.2d at 1277. For example, insertion of a nexus test appears to be a purely legislative function. *Id.*

Severance of a statute is largely a question of legislative intent, with a presumption in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Because the Court must refrain from invalidating more than is necessary, the court of appeals correctly severed the words "officer or employee" from the statute at issue. As discussed *supra*, Congressional intent to apply the honorarium ban provisions to career executive branch employees, and to speech unrelated to the performance of job duties, appears to be a legislative afterthought. The legislative history of the Ethics Reform Act is replete with references to the perceived evil of Members of Congress receiving honorarium. *E.g.*, 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (statement of Rep.

Martin); 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss); 135 Cong. Rec. S15,971-72 (daily ed. November 17, 1989) (statement of Sen. Mitchell). However, the record is silent on whether the same concerns apply to non-political, career executive branch employees. Thus, the lack of any clear legislative intent for the broad scope of this prohibition allows for severability.

Amicus Common Cause argues in its Brief that the D.C. Circuit's remedy was overbroad, and that the plaintiff class has no standing to defend high-level executive branch employees from the limitations of the ban. (Amicus Brief at 24). SEA contends, however, that the interest of Congress, if any, in limiting the acceptance of compensation for speech by career executive branch employees is the same for senior-level career employees as for lower-level career employees.

Career members of the Senior Executive Service are highly-trained, highly-skilled professional managers, with special qualification requirements, and are subject to rigorous triennial recertification by the employing agency. 5 U.S.C. §§ 3393(c), 3393a. Yet career members of the SES share the same personnel authority, namely, the Office of Personnel Management, as other career executive branch employees, including the members of the plaintiff class in the instant case. 5 U.S.C. § 3132(a)(4) (1988 & Supp. V 1993). These career managers are subject to the same ethics regulations and limitations, and are entitled to some of the same employment rights as members of the plaintiff class here. *Compare* 5 U.S.C. §§ 7511, 7513, with §§ 7541, 7543; *see also* 5 C.F.R. § 2635.102(h) (1994). The career positions occupied by these employees thus distinguish them from the politically appointed commissioners of the FTC, the NLRB, the SEC, or members of the President's cabinet, as cited by Amicus Common Cause. Career executives are subject to political and interest group pressures only to the same extent as career executive branch employees at any other level.

SEA, on behalf of its membership, therefore contends that it has the same interest as members of the plaintiff class in exercising fundamental First Amendment rights. Likewise, SEA has the same interest as Respondent in receiving compensation for these activities where the activity in question is not improper, and where it raises no appearance of impropriety. Career members of the Senior Executive Service will be adversely affected to the same degree as Respondent and members of the plaintiff class if the honorarium ban is allowed to stand.

Amicus Common Cause further contends that the court of appeals erred in not fashioning an appropriate remedy that would apply the ban to at least some lower-level executive branch employees. (Amicus Brief at 25). SEA does not agree. The court of appeals was not focusing on the pay or grade level of particular career federal employees in concluding that the ban may have some application to executive branch employees. Rather, the court below highlighted the fact that, for many executive branch employees whose off-duty speech activities bear some relationship to their federal employment, the concerns of Congress in enacting the ban may have some validity as to these employees. *NTEU*, 990 F.2d at 1274. SEA acknowledges that there may be valid application of the ban to career employees or career executives whose activities bear a nexus to the performance of job functions. However, SEA challenges any attempt to segregate among levels of career federal employees for purposes of applying the ban to speech lacking such a nexus simply on the basis of pay or grade level. Clearly such a distinction is not justified by the scant legislative record in this case. Even if such a distinction were justified, there is no conceivable severance of the ban provision that could accomplish such a result. *NTEU*, 990 F.2d at 1279.

Congressional silence as to severability does not raise a presumption against severability. The statute at issue here is clearly incapable of alternative construction without the Court

performing a legislative function. The court of appeals properly severed the honorarium ban provision as applied to executive branch employees.

CONCLUSION

The honorarium ban provisions of the Ethics Reform Act of 1989 were intended to address mounting public perceptions of impropriety resulting primarily from the acceptance of honorarium by Members of Congress. The Senior Executives Association does not advocate a distinction between different levels of career executive branch employees for purposes of the ban's application. Rather, SEA asserts that the First Amendment protects all career executive branch employees from unjustified intrusions on the freedom of speech, where the speech activities of career employees and executives targeted by the ban are unrelated to the missions of the employing agencies. The Constitution demands restraint when Congressional action infringes upon fundamental constitutional rights, which Congress failed to employ in applying the honorarium ban to career executive branch employees whose off-duty speech activities bear no relation to their employment.

Based on the foregoing, the Court should affirm the judgment rendered below.

Respectfully submitted,

George J. Shaw, Jr. *
William L. Bransford
Christopher M. Okay
Shaw, Bransford & O'Rourke
Suite 800
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 463-8400

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* *Counsel of Record*